International Union of Electrical, Radio and Machine Workers, Local 617, AFL-CIO *and* Paul E. Breese and Westinghouse Electric Corporation, Party to the Contract. Case 6-CB-5549

May 12, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 8, 1982, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, International Union of Electrical, Radio and Machine Workers, Local 617, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Maintaining, enforcing, or otherwise giving effect to the clause in its collective-bargaining agreement with Westinghouse Electric Corporation which accords preferential seniority to trustees in the event of a reduction in the working force."

2. Delete paragraph 2(a) and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain, enforce, or otherwise give effect to the clause in our collective-bargaining agreement with Westinghouse Electric Corporation which accords preferential seniority to trustees in the event of a reduction in the working force.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them under the National Labor Relations Act, or cause or attempt to cause Westinghouse to discriminate against employees in violation of the Act.

WE WILL delete from our contract with Westinghouse the provisions which afford, on our request, seniority preference to trustees at the time of reduction in the working force.

WE WILL offer to any employee (including but not limited to Paul E. Breese and Cash Dyll) who lost employment or whose job assignment was changed in consequence of the seniority preference afforded to trustee Fred Lapka on September 21, 1981, to make a request to Westinghouse to assign such employee to the job he would have occupied if such preference had not been afforded, without prejudice to his seniority or other rights and privileges, and comply with any such offer accepted by the employee.

WE WILL make all employees (including but not limited to Breese and Cash Dyll) whole, with interest, for any loss of pay they may have suffered by reason of such loss or change in employment.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 617, AFL-CIO

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard in Pittsburgh, Pennsylvania, on June 28, 1982, pursuant to a charge filed on September 30, 1981, and a complaint issued on December 30, 1981. The question presented is whether Respondent International Union of Electrical, Radio and Machine Workers, Local

[1] The Administrative Law Judge's recommended Order requires that Respondent delete from its constitution the provision according preferential seniority to trustees in the event of a reduction in the working force. We note that the constitutional provision was not alleged to be unlawful in the complaint, and that the Administrative Law Judge did not find the provision to be unlawful in her Conclusions of Law. We further note that the provision requires only that officers be given seniority preference "as outlined in the National Agreement," and that our Order requires that Respondent make appropriate modifications to its collective-bargaining agreement. Therefore, we shall not require that Respondent delete the provision in question from its constitution, and we shall modify the Administrative Law Judge's recommended Order accordingly. We shall also modify the recommended Order to require that Respondent cease and desist from "maintaining, enforcing, or otherwise giving effect" to the preferential seniority provisions in the contract. See *Liquid Carbonic Corporation, Inc.*, 257 NLRB 686, 693 (1981).

617, AFL–CIO (the Union), violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (the Act), by entering into and maintaining with Westinghouse Electric Corporation (the Company) a collective-bargaining agreement which gives certain seniority preference, in case of layoff, to employees who hold the union office of trustee.

On the basis of the entire record,[1] including the demeanor of the witnesses, and after due consideration of the helpful briefs filed by counsel for the General Counsel and by the Union, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Union is a labor organization within the meaning of Section 2(5) of the Act. The Company is a Pennsylvania corporation with its principal office and place of business in Pittsburgh, Pennsylvania. The Company is engaged in the manufacture, sale, and distribution of electrical appliances and products at numerous facilities in various States, including a plant located in Sharon, Pennsylvania. During the 12-month period ending August 31, 1981, the Company sold and shipped from its facilities products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvaia.

I find that, as the Union admits, the Company is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction in this case will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Contractual Provisions and Union Rules Regarding Superseniority for Union Trustees*

At all relevant times herein, and until at least July 12, 1982, the Company was a party to a collective-bargaining agreement (herein called the National Agreement) with the Union's parent organization (the International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC) acting for itself and in conjunction with various locals, including Respondent Union. The National Agreement covers, among other bargaining units, a unit of hourly paid production and maintenance employees at the Sharon plant and a plant in Greenville, Pennsylvania. At all relevant times herein, the Company and the Respondent Union have also been parties to a supplemental agreement limited to the Sharon-Greenville unit. As of September 1981, the Union had about 1,400 members. At all relevant times, employees in the bargaining unit represented by the Union had to become and remain members in order to keep their jobs.[2]

The 1979 National Agreement contains a provision that "in all cases of layoffs due to decreasing forces, accumulated length of service will govern." However, both the National Agreement and the Supplemental Agreement contain as to this provision certain exceptions, and at least arguable exceptions, which are not directly involved here.[3] In addition, the National Agreement contains the following provision:

> At the written request of the Local, an elected shop steward will be given seniority preference at the time when layoffs take place within the section, department or division for which he is acting as steward. Such seniority preference will enable him to retain his job within the section, department or division for which he is acting as steward so long as such job remains and when the job no longer exists the elected shop steward will be given seniority preference for another job in the same labor grade or successively lower labor grades if he can perform the duties of the job with only such training as an employeee with previous experience on such job would require. Elected officers, upon written request of the Local, will be given at the time of reduction in working force similar seniority preference within the bargaining unit in which they are employed.

As to this matter, the Supplemental Agreement, executed about March 30, 1981, provides:

> See National Agreement and the following: An elected steward or officer will be given shift preference on the written request of the Union. (Shift preference for stewards will be confined to the shift for which the steward was elected.)

The Union's answer admits, in effect, that the foregoing quoted provisions of the 1979 National Agreement were incorporated into the 1981 Supplemental Agreement.

The Union's constitution contains a list of officers which includes, *inter alia*, three trustees. The Union's answer concedes that the parties to the 1981 agreement intended the foregoing portions to be applied to trustees. The Union's constitution further provides:

> Article XIX
>
> SENIORITY PREFERENCE
>
> Section 1. Officers and Division Stewards, elected in the general election, shall be given seniority preference as outlined in the National Agreement. This seniority preference shall begin and end with their term of office.
>
> Section 2. Any officers, division steward or section steward who is involved in the Decrease in Working Force Procedure prior to taking office, his

[1] Union President John R. Capson's prehearing affidavits were offered and received without objection for the truth of the contents.

[2] Excepted from this provision were employees who were in the unit on June 1, 1951, and never thereafter joined the Union, and employees who withdrew from the Union between June 4 and 11 of any year and never thereafter rejoined the Union. Also, a 45-day grace period is contractually afforded employees who are newly added to the unit. The record fails to show how many, if any, unit employees were nonmembers.

[3] Thus, retention rights are affected by (*inter alia*) special skill in key occupations, by ability to do the job into which the employee's length of service would otherwise give him the right to "bump," and by periods spent in supervisory jobs outside the bargaining unit.

status or seniority preference shall be determined by the Executive Board.

B. *The Application of Superseniority to Union Trustee Lapka*

About late July 1980, the Union conducted its biennial election of officers. By letter dated August 11, 1980, the Union advised Respondent that certain named individuals would represent the Union as officers effective August 16, 1980, and requested seniority preference for all of them in accordance with the above-quoted provision of the National Agreement. Among the officers so named was Fred Lapka, who had been elected as one of the Union's three trustees.

At all times relevant here, employees Paul E. Breese (the Charging Party), Cash Dyll, and Lapka were employees in the Sharon-Greenville unit. Breese had a 1951 seniority date, Dyll had a 1955 seniority date, and Lapka had a 1965 seniority date. In September 1981, all three were working as class 10 welders in section Z–7 at the Sharon plant. Breese, at least, was in incentive group 6.

In August 1981, the Company advised Union President Capson that a layoff would be effected in September. Because the Company was going to "officially" notify the Union on September 14 of its layoff intentions, Capson postponed to September 17 an executive board meeting which had originally been scheduled for September 10. On September 14, the Company advised Capson that because of a lack of work on section Z–7, there would be a cutback of two class 10 welders in that section. Capson interpreted the contract as calling for retention of trustee Lapka as a class 10 welder in section Z–7. On September 17, he explained his decision and interpretation of the contract to the executive board, all of whose members (who included Capson and Lapka) had been named in the Union's August 1980 preferential-seniority requests. The executive board's ratification of Capson's decision was not necessary. The record fails to show whether any board members protested.

On September 17, Breese was called to the personnel office, where a company representative told him that, because of a reduction in force, he was being transferred to another section, Z–1 (see *infra*, fn. 6). Breese said that there was a less senior man there who was a trustee.

Upon leaving the personnel office, Breese went to Union President Capson and described the situation. Capson said that he thought Lapka had superseniority, and told Breese to file a grievance. Breese credibly testified that he did not file a grievance because "I figured there wasn't any sense filing a grievance since it was against the Union."[4] Earlier that year, Capson and two other executive board members had tried, although unsuccessfully, to induce the Company to permit Breese to transfer into his Z–7 welding job without taking a second welding test.

On September 21, 1981, Breese was transferred to the job of class 10 welder in incentive group 15, section Z–1. On the same day, Dyll also transferred to another occupational job whose nature is not shown by the record. The record fails to show whether Breese suffered any monetary loss in consequence of the transfer.[5] Nor does the record show whether Dyll lost any pay in consequence of his transfer. Lapka retained his job as a class 10 welder in section Z–7. The record fails to show what would have happened to him if he had not had preferential seniority.[6] The Union's brief states, "There is no doubt . . . that Local 617 Trustee, Fred Lapka, with less seniority than Breese, remained in section Z–7 when Breese was moved, exclusively because of Lapka's exercise of seniority preference."

Pursuant to a bid made by Breese, he was transferred on November 3, 1981, to a section Z–7 job as a class 10 structural fitter in incentive group 5, a job which he still held as of the June 1982 hearing. When he was first transferred to this job, he received only the "qualifying rate" and was not eligible for incentive pay. However, this job had the same "standard rate" as the two jobs he had previously held. He credibly testified to the belief that he eventually came to receive in his fitting job as much pay (standard rate plus incentive) as he had received on the job which he had held as of September 17, 1981; but the relevant pay records were not offered into evidence. He testified that he has no preference between the two jobs.

C. *The Duties of Trustees*

1. Duties as specified in the constitution

The Union's constitution provides that the three trustees are to be the custodians of and exercise supervision over all union property and equipment, prepare an annual written inventory, make quarterly audits of the secretary-treasurer's books,[7] and attend to the bonding of all bonded officers.[8] The constitution further forbids the payment of any voucher without at least one trustee's approval, requires the presence of at least two trustees for purchases of more than $50, and requires the name of at least one trustee on the bank deposit box.

At least two trustees must witness the notice, which the president and the secretary-treasurer must annually send to the International's general secretary, of the audit and condition of the books and records.

Under the constitution, the three trustees, plus other officers and certain stewards, comprise *ex officio* a 21-member executive board. The constitution gives each

[4] Grievances at the plant level are processed by union representatives included in the Union's August 1980 requests for preferential seniority.

[5] Both jobs had the same "standard rate." However, on the basis of comparing his paychecks, Breese testified to the belief that the Z–1 job paid $25 a week less because, in his opinion, his Z–7 incentive group was more productive. The relevant pay records were not offered into evidence.

[6] Breese's and Dyll's contractual rights included the right to displace junior employees in labor grade 10 "on a job for which [they qualified] in [their] own occupational group." The record fails to show whether any such jobs would have been available to Lapka, who was many years junior to both Breese and Dyll. Both the National and the Supplement Agreements contain rather elaborate specifications regarding the rights of an employee unneeded in his existing job. Broadly speaking, such an employee is entitled to "bump" to the highest paying job which he can perform, if the job is held by a junior employee.

[7] Such audits are also required by the International constitution. See art. XVI, sec. B.

[8] In 1981, the Union spent $155 for bond premiums. No such expenditures were made in 1980.

trustee one third vote on the executive board (whether or not other trustees are present); the remaining 18 members have one vote each. Eleven members of the executive board constitute a quorum,[9] and the board's decisions are to be made by a majority vote of those present.[10] Under the constitution, any executive board member is subject to removal if he misses two consecutive board meetings without a reasonable excuse. The constitution empowers the executive board to function in an advisory capacity; to receive recommendations from and make recommendations to the membership; to act in case of emergency between membership meetings;[11] to recommend or call special membership meetings; to require detailed statements from any officer or committee regarding any action or business done in the Union's name; to fix (with the Union's approval) compensation to be paid to any member, officer, or other person by the Union; to determine the financial arrangements necessary to ensure the orderly function of union business; to perform all the duties necessary to a proper administration of the Union's affairs; to use every possible means to organize the unorganized within its jurisdiction; to determine the date, hour, and place of the Union's internal biennial election of officers; and to hear and determine (subject to appeal to the next membership meeting) objections to the conduct or results of such elections. Also, the union business agent, who is a member of the executive board, is to prepare grievances which have not been settled by the stewards and present such grievances to the executive board or to the grievance committee and "other appropriate body of the [Union] for further disposition."

2. Duties performed in fact

John Capson, who since 1972 has served almost continuously as the union president, stated in a prehearing affidavit that the trustees are primarily the financial officers of the Union. The record shows that trustees do in fact exercise supervision over union property and equipment, make audits, and participate in making purchases and obtaining bids. During the calendar year 1981, the Union's assets amounted to about $69,000, its receipts totaled about $310,000, and its expenditures totaled about $306,000.[12] One of the trustees must in fact approve, before payment can be made, every voucher submitted to the Union by an officer or steward who claims pay from the Union for time spent on union business during what would otherwise be his working hours. In effect, the Union pays such employees at their on-the-job rate of pay for all the time they spend on union business outside management's presence; and (pursuant to the bargaining agreement) divides equally with the Company such payment of these employees for periods during their regular working hours when they are meeting with the Company for handling or adjustment of grievances or for the purposes of collective bargaining.[13] The Company submits to the Union the company records showing how much time each of these employees has spent off the clock on union business. Before approving an officer's or steward's voucher, a trustee will compare it with the Company's records and review it with the secretary-treasurer. Errors are brought to the union president's attention. On one occasion, a trustee refused to sign a voucher, which was not paid until after an investigation by the executive board. If a trustee suspects that a steward is claiming an unreasonable amount of "lost time," the trustee is supposed to, and from time to time does, check with the chief steward or the executive board about the matter.

If the chief steward or the board is not aware of any serious problem which would justify the claimed lost time, the trustee may, and sometimes does, ask the union president to discuss the matter with the steward in question, and the president at least sometimes does so. A trustee clocks out early, and goes down to the union hall (next to the Sharon plant) one afternoon a week to check these vouchers. These visits are rotated among the trustees, so that each individual trustee will check vouchers once every third week. About 20 vouchers a week are so checked. During these visits, the trustees may also participate with other officers in discussions which happen to be taking place at the same time regarding union business. In each of the calendar years 1980 and 1981, the Union's "lost time" expenditures amounted to about $64,000. I infer from the contractual "Settlement of Disputes" provisions that all grievances at the local level, which encompasses the first three steps of the grievance procedure, are handled for the Union wholly or in part by employees who depend upon this voucher system to avoid loss of pay for such activity.

During a 6-month strike in 1955, when the Union had about 7,400 members, the trustees were responsible for soliciting and handling "plant gate" money contributions into the strike fund by employees of other employers, and for issuing strike benefit vouchers. The trustees were similarly responsible for strike benefit vouchers totaling $300,000 during a 7-week 1979 strike.[14] In 1969, trustees were partly responsible for handling the distribution, to employees striking another employer in the same industry, of funds collected from the Company's employees.

Together with the secretary-treasurer, the trustees are in charge of conducting all elections, including strike votes, votes conducted during membership meetings, election of union officers and delegates, and votes on constitutional changes. The secretary-treasurer and the trustees are responsible for distributing, tabulating, and preserving the ballots.

Executive board meetings are held once a month at the union hall, frequently during regular working hours. The trustees attend these meetings, and actively partici-

[9] Inferentially, each trustee constitutes a member for quorum purposes.

[10] Although the union president is a member of the executive board, he can vote at board meetings in case of tie votes only.

[11] At a department steward's request, the president is required to call within 24 hours a special executive board meeting if a dispute in any department or division requires emergency action.

[12] In calendar year 1980, the corresponding figures were about $58,000, $347,000, and $365,000.

[13] The Company gives the employees their customary paychecks, and deducts the Union's share of the payment from the sums which the Company turns over to the Union as checked-off dues.

[14] Among the recipients of the 1979 strike benefits was Charging Party Breese.

pate in the deliberations and the votes. The Union pays the trustees for the time when they did not work at the plant because they were attending such meetings. Between at least 1973 and the 1982 hearing, no emergency meetings have been held. When a regular monthly membership meeting is held and is attended by a quorum, the members present make the final decision on any item as to which the executive board has made a recommendation. The executive board's decision is final during the 3 summer months when no regular membership meetings are scheduled and, during the rest of the year, on the frequent occasions when a quorum (35 members) does not attend the membership meeting.

The first vote on national or local strikes is made by the executive board, whose recommendation is brought to the membership. In 1979, the board voted to make a recommendation to the membership committee that it conduct a vote to authorize a strike. Such a strike vote was conducted, and a strike was thereby authorized by the Union. Between 1978 and the June 1982 hearing, the executive board made recommendations with respect to forbidding employees to work overtime occasioned by what the Union considered to be excessive layoffs; withdrawing such a ban; calling special membership meetings to explain the Union's position on various matters, including the overtime ban; changing the Supplemental Agreement provision with respect to "bumping" rights of laid-off "pole" employees and with respect to the layoff, recall, and overtime rights of crane operators; changing the Union's constitution and bylaws so as to eliminate the crane division steward; eliminating the inspection division steward; and changing the dues structure of the International constitution. All these recommendations were adopted by the membership. In 1974, the executive board recommended changes in the Supplemental Agreement with respect to occupational job status and layoff, and, in 1978, with respect to workmen's compensation. On otherwise unspecified dates between 1972 and the June 1982 hearing, the executive board made recommendations regarding the settlement of strikes; the action to be taken by the Union to avoid a lawsuit by the Company for damages as an alleged result of a work stoppage; permission for employees to work "critical situations" during a shutdown; whether to permit the Company to hire new employees for a specific job, and the computation of their seniority dates; whether to accept the Company's proposal regarding days for holidays and shutdowns;[15] the authorization of building repairs, purchase of new equipment, and payment of expenses to officers; investment of local funds; and payment of taxes. As to the recommendations described in the two preceding sentences, the record fails specifically to show whether they were adopted; the probabilities of the case lead me to infer that at least most of them were. The executive board reviews layoff procedures as necessary. In 1976, the Union selected delegates to a national conference preceding national negotiations. The delegates were to consist of five board members and five stewards. Board members volunteered to serve as delegates, and one of the trustees attended.

The negotiating committee and the grievance committee consist of the same persons, and do not include trustees. When the grievance committee turns a grievance down, the grievance steward can bring the matter up before the executive board. When the grievance committee rules on the submission of a grievance to arbitration, any member has the right to question this action. A motion must be made and seconded for the executive board to determine the fate of a grievance.[16] In either such case, the executive board has the power to recommend that the grievance committee be overruled. Between 1976 and 1982, the grievance committee was thus challenged once, about 1978.

Under the bargaining agreement, the Union has the right to appeal to the "national appeal" level a grievance lost at the third step, and to take to arbitration certain grievances lost at the "national appeal" level. Whether to take such steps is determined by a screening committee of the grievance committee (or perhaps, as to arbitration, by the plant steward, a screening committee member *ex officio*). The board has power to reject these recommendations (subject to reversal by the membership, at least as to arbitration) but there is no evidence that the board has ever done so.

The bargaining agreement permits strikes at the local level, during the effective period of the contract, with respect to "exhausted grievances"—that is, grievances with respect to which the grievance procedure has been exhausted, and which are not subject to the arbitration procedure. Inferentially because of such provisions, on occasion a settlement is reached as to "exhausted grievances." If the stewards' council decides to recommend a strike with respect to "exhausted grievances," that recommendation is taken to the executive board, which will then vote on whether to recommend a vote among the membership about whether to authorize a strike. The executive board voted for such a recommendation in 1964, 1969, and 1971. On all these occasions, a settlement was reached and no strike occurred. No such recommendation was made to the executive board between 1972 and 1978, and there is no evidence of any between 1978 and the June 1982 hearing.

From time to time, the Company and the executive board (including the trustees) have a meeting in the plant during which the Company describes the state of its business and the Union describes the state of the Union. These meetings are held about twice a year; but as of the June 1982 hearing, the most recent such meeting had been held no later than 1979. These meetings aside, the trustees perform no union duties on company time and property.

The trustees may occasionally be asked to help the Union in grievance proceedings, but as "union-minded" employees who work in the area rather than as trustees. On one occasion in about 1978, a section steward who was off for 2 or 3 weeks asked the plant steward to have Andy Drosky, who was a trustee, serve as substitute

[15] Under the National Agreement, local management must or may schedule vacation shutdowns, and alternative days for Saturday and certain other holidays, after discussing the matter with the local union.

[16] It is unclear whether the motion must be carried.

steward, and this was done. Filling in for an absent steward is not part of a trustee's regular functions, and there is no evidence that a trustee did this on any other occasion. The trustee's duties do not involve dealing directly with the employer, and (according to Union President Capson) are primarily those which revolve around internal functions of the Union.

D. *The Selection of Trustees*

The trustees are elected every 2 years by vote of the membership. The winning candidates are the three who receive the highest vote. During the 1980 election when Lapka was elected trustee, seven or eight members ran for that office. The trustees do not receive any salary from the Union. During the calendar year 1981, each trustee received $610 to $735 "lost time" compensation.

E. *The History of Preferential Seniority*

During the intraunion election campaign in progress during the June 1982 hearing, votes for trustee and other offices were solicited by some candidates on the ground that they were senior to their opponents. A candidate who was seeking to displace the incumbent union president was urging that the number of stewards be reduced to maintain superseniority at a minimum in order to open jobs and afford more flexible opportunities to senior people. During prior elections conducted while the work force was being cut back, many steward candidates with long years of service have successfully campaigned on the ground that they should receive seniority preference over opponents with fewer years of service.

The National Agreement provisions regarding top seniority for union representatives have been substantially the same since 1947.[17] Bargaining proposals for national negotiations are solicited from the membership. Richard M. Jellette, a union member since 1947 (see *supra*, fn. 17) and an officer since 1951, credibly testified that, to his knowledge, no membership actions had ever been taken regarding the top seniority provisions. During this entire period, the Union has exercised its contractual option to procure preferential seniority for stewards and officers.[18] Breese, a member since 1948 (see *supra*, fn. 17), credibly testified that he had never raised any objection in the Union to the granting of seniority preference to trustees, and knew of nobody who ever had. Jellette credibly testified that nobody had ever moved at a membership meeting to delete the preferential-seniority provisions in the Union's constitution.

F. *Analysis and Conclusions*

1. The Union's procedural defenses

The Union contends that the disposition of an earlier charge against it constitutes a procedural bar to the unfair labor practice complaint in the instant case. On October 19, 1977, George D. Molchan filed a charge against the Union alleging that the Union had violated Section 8(b)(2) in that "On or about August 8, 1977, and at all times thereafter, the [Union] caused or attempted to cause [the Company] to discriminate with respect to the seniority of George D. Molchan in violation of Section 8(a)(3)." During the investigation of that charge, the Union supplied the Regional Office with a copy of the Union's constitution, which has not thereafter been changed in any way material here, and a copy of the 1977 National Agreement, which contained the same provisions as the 1979 contract regarding seniority preference for union officers and stewards. About July 1978, Molchan and the Union entered into an informal settlement agreement which was approved by the Regional Director, and in which the Union undertook not to enforce with the Company any agreement giving shift preference to trustees; not to cause or seek to cause the Company to discriminate against Molchan or any other employee, with respect to choice of shift assignment, by according top seniority to a union trustee for the purpose of shift assignment; nor in any other manner to restrain or coerce employees in the exercise of their statutory rights; and to notify the Company that the Union has no objection to allowing employees to bid on shift assignments and will allow renewed bidding thereon without enforcing the application of shift preference for the trustees. Since entering into the settlement, the Union has not granted shift preference to trustees. However, the Union has not rewritten its constitution and, as to preferential seniority for union representatives, the Union's constitution and the present Supplemental Agreement contain the provisions in effect prior to the settlement.

The Union contends, in effect, that the Regional Director's agreement to a settlement of the Molchan case, without any reference to preferential seniority for trustees in the event of layoff, bars the instant proceeding by virtue of the doctrines of *res adjudicata* and collateral estoppel. I assume, without deciding, that the disposition of the Molchan case is a "final judgment" within the meaning of the cases requiring the existence of a "final judgment" as a precondition to a *res adjudicata* or collateral-estoppel claim. Cf. *Zimnox Coal Co.*, 140 NLRB 1229, 1237 (1963), enfd. 336 F.2d 516 (6th Cir. 1964); *N.L.R.B.* v. *Baltimore Transit Co.*, 140 F.2d 51, 54–55 (4th Cir. 1944), cert. denied 321 U.S. 795 (1944). However, the Molchan case cannot give rise to a *res adjudicata* or collateral-estoppel claim against Breese, because he was neither a party thereto nor in privity with a party. *Wonder Markets, Inc.*, 249 NLRB 294 (1980); *General Motors Corp.*, 158 NLRB 1723, 1728–29 (1966) (see *infra*, fn. 20).[19] Furthermore, not even the General Counsel could be so barred by the Molchan case. The general rule of *res adjudicata* is inapplicable, because the cause of action in the instant case is not the same. *Commissioner v.*

[17] The 1947–50 contract was with the United Electrical Workers, from which the IUE emerged in consequence of a schism.

[18] However, on one occasion the plant steward and the executive board notified the Company that, if any incumbent steward was defeated for reelection, he would not receive seniority preference for the balance of his term. Some locals under the National Agreement extend preferential seniority to some officers but not others.

[19] Cf. *Mosher Steel Co.* v. *N.L.R.B.*, 568 F.2d 436, 438–441 (5th Cir. 1978), finding collateral estoppel as to a previously litigated factual strike-violence issue where the union's interest as respondent in the earlier proceeding was much the same as the interest, in a later proceeding initiated by the union's charge, of a unit-employee/striker denied reinstatement for such violence.

Sunnen, 333 U.S. 591, 596 (1948). Moreover, the principle of collateral estoppel is likewise inapplicable, because the present case involves a separate (although similar) set of relevant facts. Thus, the Molchan case involved, *inter alia*, the Company's 1977 collective-bargaining agreement with the International; a supplemental agreement, between the Union and the Company, which preceded the March 1981 Supplemental Agreement involved here; a 1976 request by the Union for seniority preference to newly elected trustees, not including Lapka or any of the trustees elected in 1980; and a claim by Molchan that the Union had caused unlawful discrimination against him personally in August 1977, which claim at least included (and, perhaps, consisted of) a claim that the shift assignment which he wanted had been unlawfully given to then trustee Andy Drosky. The instant case, on the other hand, involves the 1979 National Agreement; the March 1981 Supplemental Agreement; a 1980 request for seniority preference to Lapka and two other employees who had not been elected as stewards in 1976; and a claim that in September 1981 Breese was unlawfully deprived of a particular job in a particular section because of unlawful preference to Lapka during a reduction in force. Moreover, while the Molchan charge empowered the General Counsel to issue a complaint attacking the maintenance of an employment condition affording seniority preference to trustees in case of layoff, there is no evidence that the General Counsel in fact considered that issue before assenting to the Molchan settlement. Accordingly, the Molchan disposition could not effect a collateral estoppel as to the layoff issue raised by the instant case. *Sunnen supra*, 333 U.S. at 601; *United States* v. *International Building Co.*, 345 U.S. 502 (1953); *United States* v. *Silliman*, 167 F.2d 607, 613–615 (3th Cir. 1948), cert. denied 335 U.S. 825 (1948). Finally, even assuming that the disposition of the Molchan case met all of the criteria required to establish collateral estoppel, I regard its application as inappropriate to the instant case. This doctrine should not be applied where its effect would be to freeze the Company's and the Union's rights and obligations with regard to preferential seniority for union representatives, at a time when the law in this area is in a state of flux. See 2 Davis, Administrative Law Treatise, Sec. 1803, pp. 557–568 (1958); *Texaco, Inc.* v. *U.S.*, 579 F.2d 614, 616–617 (Ct. Cl. 1978); *Mosher Steel, supra*, 568 F.2d at 400 ("collateral estoppel is not normally applied to conclusions of law made by the agencies"). Thus, the Union would likely not regard itself as bound by the Molchan disposition should the Board and the courts eventually uphold shift priority to union officers.[20]

Respondent further contends that the instant proceeding is barred by the Molchan settlement agreement because of the Board's policy in refusing to consider unfair labor practice allegations encompassed by such agreements. However, the material events in the instant proceeding did not take place until after the 1978 execution of the settlement agreement. Accordingly, under Board policy, that agreement does not bar the instant complaint. *Cambridge Taxi Co.*, 260 NLRB 931 (1982) ("a settlement agreement disposes of all issues involving *presettlement* conduct of the parties"; emphasis supplied); *Utrad Corp.*, 185 NLRB 434 (1970), modified 454 F.2d 520 (7th Cir. 1971).

2. Whether the Union violated the Act by executing and maintaining with the Company a contract which gives preferential seniority to trustees in case of layoff

At the present time, the most recent decision by the Board itself regarding preferential seniority for union officials is *McQuay-Norris, Inc.*, 258 NLRB 1397 (1981). This case was considered by a panel consisting of Members Fanning, Howard Jenkins, Jr., and Zimmerman, a majority of whom (Member Fanning dissenting) adopted *in toto* the Administrative Law Judge's decision which stated, *inter alia*:

> . . . union officers may not benefit from superseniority clauses except when they serve as steward or otherwise engage in administration of the union contract at the place and during their hours of employment . . . while superseniority clauses are lawful on their face, if the General Counsel proves, without adequate rebuttal, that the functions of the union officers involved did not relate in general to the furthering of the bargaining relationship, the application of the clause becomes invalid.

On the basis of these principles, the decision went on to find unlawful, to the extent applicable to union trustees, a contract clause which afforded preferential seniority to certain union officers in the event of layoff. The trustees' duties under the union's constitution and bylaws, and as performed in fact, were much the same as the trustees' duties in the instant case, including their duties as members of the executive board. Moreover, practically all the trustees' duties in the instant case were performed outside the plant. Also, in *Liquid Carbonic Corporation, Inc.*, 257 NLRB 686 690–691 (1981), and *Complete Auto Transit*, 257 NLRB 630, 634 (1981), the same panel, similarly divided, held that preferential seniority clauses which are otherwise unlawful remain unlawful even though the eligible employees have elected the union representatives who receive such seniority, and irrespective of the consent of those adversely affected.

If unreservedly followed, these three decisions require that the instant complaint be sustained. Because they are the most recent Board decisions in this area, and because all members of the panel in these cases are members of the present Board, I regard it as appropriate to base my decision thereon in the instant case. I would adopt this approach even assuming that these cases could properly be disregarded upon some suggestion that the nonparticipating members agreed with the dissent, for I am aware of no such suggestion. While the Union strenuously attacks the merits of *McQuay-Norris*, my personal opinion

[20] The court of appeals denied enforcement of *General Motors, supra*, 158 NLRB 1723. See 56 LC ¶ 12,133 (9th Cir. 1967). (Only the judgment is printed; the Court's unpublished *per curiam* decision relied solely on prior cases holding similar contractual provisions to be lawful.) The Supreme Court eventually found similar provisions unlawful, relying partly on the Board's *General Motors* decision. *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322 (1974). Presumably, neither General Motors nor the International Union which was a respondent in that case now feels privileged to maintain such clauses.

of it does not affect any duty to follow it which I would otherwise have had. *Insurance Agents' International Union (Prudential Insurance Co.)*, 119 NLRB 768, 772–773 (1957), enforcement denied 260 F.2d 736 (D.C. Cir. 1958), affirmed 361 U.S. 477 (1960). Moreover, I decline the parties' flattering apparent invitation to offer my own opinion about the approach which should be taken in affording preferential seniority to union representatives. In view of the numerous and conflicting views which have already been advanced in this area, the belated addition of my own would likely contribute to the present confusion, without contributing to the soundness of the views which eventually prevail.

CONCLUSIONS OF LAW

1. The Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union has violated Section 8(b)(1)(A) and (2) of the Act by entering into and maintaining an agreement with the Company which the parties intended to apply to union trustees, and which provides that, on the Union's request, elected officers will be given, at the time of reduction in working force, seniority preference within the bargaining unit in which they are employed.
4. Such unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that the Union has violated the Act in certain respects, I shall recommend that it be required to cease and desist from such conduct, and like or related conduct. Affirmatively, the Union will be required to delete from its constitution that portion which requires the granting of seniority preference to trustees in case of layoff; to delete from its agreement with the Company the provisions which afford such preference on the Union's request;[21] to offer, to any employee (including but not limited to Breese and Cash Dyll) whose job assignment was changed in consequence of the seniority preference afforded to Fred Lapka on September 21, 1981, to make a request to the Company to assign such employee to the job he would have occupied if such preference had not been afforded; and to comply with any such union offer accepted by the employee. Also, the Union will be required to make all employees (including but not limited to Breese and Cash Dyll) whole for any loss of pay they may have suffered by reason of such loss or changes in employment from the effective date thereof to the date on which the employee fails to accept such union offer or on which he obtains a job substantially equivalent to the one of which he was unlawfully deprived, whichever first occurs. Loss of pay shall be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[22] In addition, the Union will be required to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:

ORDER[23]

The Respondent, International Union of Electrical, Radio and Machine Workers, Local 617, AFL–CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Executing or maintaining with Westinghouse Electric Corporation any agreement calling for preferential seniority, on Respondent's request, to trustees in case of reduction in force.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act; or causing or attempting to cause Westinghouse to discriminate against employees in violation of Section 8(a)(3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Delete from its constitution that portion which requires the granting of seniority preference to trustees at the time of reduction in working force.

(b) Delete from its collective-bargaining agreement with Westinghouse the provisions which afforded, on the Union's request, seniority preference to trustees at the time of reduction in working force.

(c) Offer, to any employee (including but not limited to Paul E. Breese and Cash Dyll) who lost employment or whose job assignment was changed in consequence of the seniority preference afforded to Fred Lapka on September 21, 1981, to make a request to Westinghouse to assign such employee to the job he would have occupied if such preference had not been afforded, without prejudice to his seniority or other rights and privileges; and comply with any such union offer accepted by the employee.

(d) Make all employees (including but not limited to Breese and Cash Dyll) whole for any loss of pay they may have suffered by reason of such loss or changes in employment, in the manner set forth in that part of this Decision entitled "The Remedy."

(e) Post in conspicuous places in Respondent's business office, meeting hall, and all places where notices to members are customarily posted copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, in-

[21] The Company was served with a copy of the complaint, whose caption names it as party to the contract, but chose not to appear.

[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

Continued

cluding all places where notices to members are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Sign and mail sufficient copies of said notices to the Regional Director for Region 6 for posting by Westinghouse, in the locations in its Sharon and Greenville plants where notices to its employees are customarily posted, if Westinghouse is willing to do so.

(g) Notify the Regional Director for Region 6, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."